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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHARLES WINDHAM,  
Plaintiff,

v.

STATE OF CALIFORNIA, et al.,  
Defendants.

No. 2:20-cv-0773 TLN DB P

ORDER

Plaintiff is a state prisoner who was proceeding pro se with a civil rights action. Plaintiff claimed that defendants violated his rights by taking items from his cell. This action was closed on April 14, 2021. (ECF Nos. 21, 22.) Presently before the court are plaintiff's motion for the appointment of counsel. (ECF Nos. 29, 30.)

By order dated June 14, 2021, the undersigned advised plaintiff that his allegations that he faces danger at the hands of prison gang members could not be pursued in this action. (ECF No. 25.) He was further instructed that should he wish to reopen this action he should file a motion for relief from judgment along with a proposed amended complaint.

Plaintiff has now filed two motions seeking the appointment of counsel. In his initial motion he argued counsel should be appointed based on the complexity of the case to protect his due process interests. (ECF No. 29.) His second motion alleges that he is being "terrorized, mistreated, electrocuted, gassed ('knock-out' gas thr[ough] airvent to BED-#7@ TC-2), robbed of

1 writing utensil, court paper/envelopes/stamps . . . robbed by guards and psych-techs.” (ECF No.  
2 30.) He claims the guards at Salinas Valley State Prison, where he is presently held, take orders  
3 from prison gang members. He requests that the court appoint counsel to help him with these  
4 issues.

5 The United States Supreme Court has ruled that district courts lack authority to require  
6 counsel to represent indigent prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490  
7 U.S. 296, 298 (1989). In certain exceptional circumstances, the district court may request the  
8 voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d  
9 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).

10 The test for exceptional circumstances requires the court to evaluate the plaintiff’s  
11 likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in  
12 light of the complexity of the legal issues involved. See Wilborn v. Escalderon, 789 F.2d 1328,  
13 1331 (9th Cir. 1986); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). Circumstances  
14 common to most prisoners, such as lack of legal education and limited law library access, do not  
15 establish exceptional circumstances that would warrant a request for voluntary assistance of  
16 counsel.

17 In the present case, the court does not find the required exceptional circumstances. The  
18 original and second amended complaints in this action were dismissed with leave to amend for  
19 failure to state a claim. (ECF Nos. 6, 14.) Plaintiff failed to file a third amended complaint.  
20 Without an operative complaint, the court cannot make an evaluation of plaintiff’s likelihood of  
21 success on the merits. Therefore, the court will deny the motions to appoint counsel.

22 Additionally, as plaintiff was advised in the June 14, 2021 order, the allegations contained  
23 in his motions cannot be pursued via this closed action. The allegations presented in the instant  
24 motions do not relate to the allegations contained in the complaint in this case. Thus, the relief  
25 sought cannot be granted because it is unrelated to plaintiff’s underlying claims in this action.  
26 Pacific Radiation Oncology, LLC v. Queen’s Medical Center, 810 F.3d 631, 633 (9th Cir. 2015)  
27 (“When a plaintiff seeks injunctive relief based on claims not pled in the complaint, the court  
28 does not have authority to issue an injunction.”).

1           Accordingly, IT IS HEREBY ORDERED that plaintiff's motions for the appointment of  
2 counsel (ECF Nos. 29, 30) are denied.

3 Dated: July 8, 2021

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7 DEBORAH BARNES  
8 UNITED STATES MAGISTRATE JUDGE  
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